IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CARROLL MICHAEL, Plaintiff/Appellant, v. CLINT EVAN McGEE; ARIZONA DEPARTMENT OF CORRECTIONS, Defendants/Appellees.	2 CA-CV 2007-0010 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV 2005-00142

Honorable R. Douglas Holt, Judge

AFFIRMED

Matthew A. Ritter
Florence
Attorney for Plaintiff/Appellant

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By Bruce L. Skolnik
Tucson
Attorneys for Defendants/Appellees

H O W A R D, Presiding Judge.

¶1 Appellant Carroll Michael appeals from the trial court's grant of summary judgment in favor of appellees Clint McGee and the Arizona Department of Corrections

(collectively, "the state"). Michael argues that the state was precluded from raising his noncompliance with the notice-of-claim statute as a defense and that a genuine issue of material fact exists regarding whether Michael filed a sufficient notice of claim. Finding no error, we affirm.

¶2 We view the facts in the light most favorable to Michael, the nonmoving party. *See Stein v. Sonus USA, Inc.*, 214 Ariz. 200, ¶ 2, 150 P.3d 773, 774 (App. 2007). On February 5, 2004, Michael, riding a motorcycle, and McGee, driving a state-owned vehicle, were involved in a collision. Michael filed a notice of claim under A.R.S. § 12-821.01 with the Arizona Attorney General's Office on March 4, 2004. It contained a footnote stating, "Please note that this is a claim for property damage only; claim for personal injuries shall be forthcoming." Michael's counsel also filed with the Attorney General's Office and Risk Management a "Letter of Representation" stating he and another attorney would represent Michael. The parties settled the property damage claim, but Michael never filed a written notice of claim for personal injury. He later avowed that a state employee told him in a telephone conversation that he did not need to file such a notice.

¶3 Michael sued the state for his personal injuries on February 3, 2005, but did not serve the complaint within 120 days as required by Rule 4(i), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. The state moved to dismiss the complaint, as permitted under Rule 4(i). Finding good cause for Michael's failure to timely serve the complaint, *see* Rule 4(i), the trial court denied the motion. The state then answered the complaint, alleging, among other affirmative defenses, noncompliance with § 12-821.01. It then moved for summary judgment on that

ground. The trial court, finding no genuine issue of material fact regarding the sufficiency of the notice, granted the motion and entered judgment in favor of the state.

¶4 Michael first argues, citing Rule 12(g), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, that the trial court erred by considering the issue of his noncompliance with § 12-821.01, which the state had not raised in its prior motion to dismiss. This issue involves the interpretation of a court rule, which we review de novo. *See Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 8, 153 P.3d 1069, 1071 (App. 2007).

¶5 The state filed its motion to dismiss under Rule 4(i), not under Rule 12(b). Rule 12(g) expressly applies only to motions made under Rule 12. Therefore, the provisions of Rule 12(g) simply do not apply, and the state's failure to raise the notice-of-claim issue in the first motion did not result in a waiver of the issue. Thus, the trial court did not err in addressing the issue.

¶6 Michael next argues the doctrine of res judicata prohibited the trial court from considering the motion for summary judgment because the court had deemed the notice-of-claim issue moot in ruling on the motion to dismiss. A trial court generally may reconsider its own nonfinal rulings, and we "review any such reconsideration merely for abuse of discretion." *Davis v. Davis*, 195 Ariz. 158, ¶ 14, 985 P.2d 643, 647 (App. 1999). For res judicata or claim preclusion to apply, a final judgment must have been entered. *See Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 13, 146 P.3d 1027, 1033 (App. 2006). Here, no final judgment had been entered and res judicata could not apply. Accordingly, the trial

court did not abuse its discretion in considering the issue raised in the summary judgment motion.

¶7 Michael further argues the trial court erred in granting summary judgment because the state's answer constituted a disallowance of the claim, permitting the action to proceed. He cites *Mammo v. State*, 138 Ariz. 528, 675 P.2d 1347 (App. 1983), in support of his position. But, in *Mammo*, the issue was whether the action could proceed in the absence of a formal disallowance of the claim by the state. The court specifically stated: "It is undisputed that appellee made a proper claim in accordance with A.R.S. § 12-821." 138 Ariz. at 530, 675 P.2d at 1349. Here, Michael did not file a personal injury notice of claim, and *Mammo* therefore does not help him. Rather, he is bound by the general rule that requires the filing of a proper, timely notice of claim. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 6, 152 P.3d 490, 492 (2007); *Ariz. Dep't of Revenue v. Dougherty*, 200 Ariz. 515, ¶¶ 16-17, 29 P.3d 862, 867 (2001).

¶8 Michael next argues the trial court erred in granting summary judgment because he filed the property damage notice of claim and letter of representation and a state Risk Management employee informed his counsel that he did not need to file another notice of claim pertaining to the personal injury. We review de novo whether a genuine issue of material fact exists. *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

¶9 The state characterizes this issue as one of equitable estoppel and asserts that a more formal memorialization of the conversation is required. Michael disputes the state's

assertion, claiming he is merely demonstrating that an issue of fact exists concerning the sufficiency of the notice of claim. Unfortunately, there is no issue of fact concerning his notice of claim. It does not include the required elements to assert a claim for personal injury and is defective, precluding this action unless the state waived the statutory requirements. *See* § 12-821.01(A) ("The claim shall contain . . . a specific amount for which the claim can be settled and the facts supporting that amount."); *Deer Valley*, 214 Ariz. 293, ¶ 9, 152 P.3d at 493. Therefore, we conclude that the state's argument concerning equitable estoppel provides a proper basis for analysis of this issue.

¶10 The state cites *Open Primary Elections Now v. Bayless*, 193 Ariz. 43, 969 P.2d 649 (1998), in support of its position. In that case, the supreme court stated:

> To assert equitable estoppel against the State, a party first must show that the State performed an affirmative act, inconsistent with a claim later relied upon, with "some considerable degree of formalism under the circumstances . . . . It is rare that satisfactory evidence of an absolute, unequivocal, and formal state action will be found unless it is in writing." *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 577, 959 P.2d 1256, 1268 (1998). Even under the facts as alleged by appellants, Ms. Thompson and the County Recorder never reduced the alleged agreement to writing, and no degree of formality characterized the purported agreement. We cannot find the requisite formality to estop the State from rejecting the Thompson petitions.

193 Ariz. 43, ¶ 14, 969 P.2d at 653 (alteration in *Open Primary Elections Now*).

¶11 We accept, as did the trial court, that the conversation occurred as avowed by counsel. But counsel's conversation with the Risk Management employee lacked the "considerable degree of formalism" required and was not reduced to writing. Therefore, it

does not qualify under *Open Primary Elections Now*. We further note that § 12-821.01(A) is very clear that a timely notice of claim detailing the amount claimed and the facts supporting the amount claimed must be filed. *See Open Primary Elections Now*, 193 Ariz. 43, ¶ 15, 969 P.2d at 653 (reasonable reliance also required). Therefore, the trial court did not err in granting summary judgment despite the conversation.

¶12 Finally, Michael appears to argue that the trial court erred in granting summary judgment because a letter to the Arizona Department of Administration detailing his claims satisfied the purposes of the notice-of-claim statute. But that letter, dated September 2, 2005, was written well outside the 180-day period Michael had to file a notice of claim, *see* § 12-821.01(A), and cannot save his claim.

¶13 The judgment of the trial court is affirmed.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge